United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1162

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

NO.74 -1162

ARCHIE PELTZMAN,
PLAINTIFF, APPELLANT
-against-
CENTRAL GULF S.S. CO.
DEFENDANT, APPELLE

BRIEF FOR THE PLAINTIFF, APPELLANT.

ARCHIE PELTZMAN, PRO-SE
8725, 16th Avenue
Bklyn, 11214, N.Y.C.
256-4658

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FOR THE SECOND CIRCUIT

No. 74-1162

ARCHIE PELTZMAN,

Plaintiff-Appellant,

v.

CENTRAL GULF STEAMSHIP CO.,

Defendant-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT

ISSUES PRESENTED

1. Was there evidence in the pleadings that jurisdiction was not pre-empted by the National Labor Relations Board?

The Court held that the N.L.R.B. has exclusive jurisdiction and did not rule on the pleadings before granting summary judgment.

2. Was there evidence in the pleadings that the contract defendant relied on in discharging plaintiff was

based on a closed shop contract which Taft-Hartley outlawed in industries in interstate commerce?

The Court relied on the N.L.R.B. decision which refused to issue a complaint against the defendant and the union, and did not rule on the pleadings, except on the motion for summary judgment.

3. Was there evidence that the union security clause was valid when it required plaintiff to pay an initiation fee of $2,000.00 in order to regain his employment aboard the S/S Green Ridge, after a vacation, even though Title 46, Sec. 599(a) makes it a misdemeanor for anyone to demand payment from a seaman for providing him with employment?

The Court relied on N.L.R.B. decision that the clause was valid and ruled that 46 U.S.C., Sec. 594 has no application to the situation, and made no ruling on 46 Sec. 599(a).

4. Was there evidence in the pleadings that plaintiff had utilized Rules 26-37 F.R.C.P. in an effort to get depositions, written interrogatories, request for production of documents, request for admission of factual or

documentary certainties and subpoenas for production of N.L.R.B. and company records?

The Court held that it was not necessary to rule on plaintiff's prior motions for discovery nor on the motion by the N.L.R.B. to quash a subpoena, in view of the Court's disposition of this summary judgment motion.

5. Was there evidence to indicate the slightest doubt as to the facts?

The Court held that there was material issues of fact regarding (5) defendant's pleading that plaintiff has not exhausted internal union grievance procedures, and that (3) Prof. Davis' Administrative Law Treatise, Sec. 18:06 stating that a refusal by the N.L.R.B. to issue a complaint is not a final decision on the merits.

STATEMENT OF CASE

This is an appeal from a summary judgment order dismissing the complaint by Judge Knapp on January 15, 1974. The complaint is a maritime action for damages for wrongful discharge, and failure to rehire, based on plaintiff's permanent assignment to the vessel (A 40) by the union.

Plaintiff filed motions for discovery, production of records, genuineness of documents, motion to strike, interrogatories, memorandums of law and a cross-motion for partial summary judgment.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V of U.S. Constitution:

"No person shall. . . nor be deprived of life, liberty or property, without due process of law."

Amendment XIV of U.S. Constitution:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Amendment IX of U.S. Constitution:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Article III, Sec. 2 of U.S. Constitution:

"The judicial power shall extend. . . to all cases of admiralty and maritime jurisdiction."

Article I, Sec. II of New York State Constitution:

"Equal protection of laws, discrimination in civil rights prohibited."

"No person shall be denied the equal protection of the laws of this state or any sub-division thereof. No person shall, because of face, color, creed or religion, be subject to any discrimination in his civil rights by any person or by any firm, corporation, or institution, or by the State or any agency or subdivision of the State."

STATUTES INVOLVED

Title 28, U.S.C. 1331, 1333, 1337, 2201.

Title 46 U.S.C. 599, 41 Stat. 1006, Sec. 10(a).

Merchant Marine Act of 1920:

". . . If any person shall demand or receive either directly or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500."

Title 29 U.S.C.A. Sec. 412, Sec. 402:

"Member or members in good standing when used in reference to a labor organization includes any person who has fulfilled the requirements for membership in such organization and who neither has voluntarily withdrawn from membership after appropriate

proceedings of the Constitution and by-laws of such organizations."

Title 29 U.S.C. Sec. 523, Sec. 603(a, 73 Stat. 540:

"Except as specifically provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer . . . or other representative of a labor organization . . . under any other Federal Law or under the laws of any State and except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal Law or Law of any State."

PLAINTIFF'S THEORY OF CASE

Under Article 3, Sec. 2 of the U.S. Constitution, the judicial power extends to all cases of admiralty and maritime cases so that the N.L.R.B. decision not to issue a complaint is reviewable and not pre-empted.

The Maritime Law, Constitutional Law and plaintiff's illegal dismissal from union in 1950 without notice or hearing, prevents the union from claiming that plaintiff is a new member. Plaintiff's rights for reinstatement into the

union were the same as seamen who were granted validated Coast Guard documents in the PARKER v. LESTER case, 227 F.2d 708 (1955). Also, the closed shop contract makes the union security clause invalid and also makes preferential hiring invalid. The clause is not enforceable because it is repugnant to the U. S. Constitution and nineteen States, not including New York State which specifically outlaw it. Those items referring to wages and other benefits in the bargaining agreement are not invalid because they were made for benefit of members. Anything in the contract that deprives members of constitutional rights that they are entitled to, but which are denied to them because of rules or regulations of the union, are invalid. Also that the N.L.R. A. is permissive but not enforceable in a maritime case because of prohibitive statute Title 46, Sec. 599a and other statutes preventing checkoff of seamen's dues, and Title 29 U.S.C.A. Sec. 412, Sec. 402 and Title 29 U.S.C. Sec. 573, Sec. 603a, 73 Stat. 540 and the U. S. Constitution, Bill of Rights and the LM.R.D.A. Bill of Rights and the New York State Constitution. The defendant could not discharge plaintiff without written charges, a hearing, and any offense charged had to be in relation to the ship and

Master's orders.

DEFENDANT'S THEORY OF CASE

Defendant relies on five grounds as set forth in Judge Knapp's opinion.

1. MOTOR COACH EMPLOYEES v. LOCKRIDGE, which holds that N.L.R.B. has exclusive jurisdiction of plaintiff's claim in a State Court.

2. Collateral estoppel because plaintiff sued the Union in State Court. PELTZMAN v. A.R.A., 327 N.Y.S.2d 505, affd. 35 N.Y.S.2d 998, cert. den. Docket No. 72-1080 (1972), that Court dismissed for lack of jurisdiction.

3. Relies on N.L.R.B. decision not to issue a complaint against the Union and the defendant for causing plaintiff's discharge.

4. Relies on N.L.R.B. ruling that defendant did not have to rehire plaintiff.

5. Relies on pleadings that plaintiff did not exhaust internal union grievance procedures.

DISTRICT COURT'S RULING

Held - N.L.R.B. has exclusive jurisdiction, but

that there was material issues of fact in dispute as to (5) and that (3) Prof. Davis' treatise on Administrative Law, Sec. 18.06 disputed general opinion that refusal to issue a complaint by N.L.R.B. is a final decision on the merits.

THE JUDGMENT OF DISTRICT COURT

Held-That complaint be dismissed and that 46 U.S.C. Sec. 594 has no application to the situation, and that it is not necessary to rule on plaintiff's prior motions for discovery nor on the motion by the N.L.R.B. to quash a subpoena. All now are moot.

FACTS

The plaintiff, a seaman, joined the American Communications Association, the predecessor of the American Radio Association, in 1943 (A 103). He sailed in the Merchant Marine from October, 1943 until June, 1949, the date the United States Coast Guard refused to issue a Radio Officer's License to plaintiff, claiming that he was either a member of the Communist Party or sympathetic to its principles.

When plaintiff could no longer sail in the Merchant

Marine due to the Coast Guard's refusal to issue a license to him, his union gave him an inactive assignment slip dated March 17, 1950 (A24) to the Port of Boston, and the official Carl Lundquist, the then Secretary-Treasurer, explained that if he received his license before a year was up, he would only have to pay the dues up to that date. He said a withdrawal assignment slip would make the plaintiff liable to pay a year's dues if he received the license before the year was up. He told plaintiff the Boston assignment was only procedural as it was easier to ship from Boston than New York and he wanted plaintiff to ship out as fast as possible after receiving the possible license.

It was not until August, 1967 when plaintiff received a Radio Officer's license from the Coast Guard as a result of suing the Commandant in Federal Court (PELTZMAN v. SMITH, C.A.N.Y. 404 F.2d 335) that plaintiff resumed sailing again through the same union he had belonged to previously.

When plaintiff applied for reinstatement to the union in December, 1967, the official who gave him a permit

card to sign, Mr. Bernard Smith, the Secretary-Treasurer, told him this was the procedure that old and new members had to go through in order to join or rejoin the union. Plaintiff at that time, when he filled out the permit card, saw a line on the card which read initiation fee and told Mr. Smith that he didn't think he should have to pay the fee, but that he would pay a withdrawal fee. Mr. Smith replied that since plaintiff would have to sail as a permit card member for one year, he would at that time talk about the initiation fee, and in the meantime plaintiff would only have to pay the dues required from all members of the union.

After one year passed, the Secretary-Treasurer demanded $2,000.00 from the plaintiff as an initiation fee and plaintiff refused to pay it, whereupon he was told that he would no longer be able to sail from the Group 1 list but would lose seniority and be on the Group 2 list.

Plaintiff tried to get this matter settled by arbitration as provided in the contract, and so he asked the Secretary-Treasurer the name and telephone number of the official who handled these complaints. He refused to tell

him, so that petitioner had to read the contract and got the address of the Maritime Institute from it (A104), and sent out a letter with a copy to the union as provided in the contract. No answer was received and so after three weeks went by, plaintiff went to the address and spoke to Mr. Benson, who told him he would see if he could help plaintiff. After about two and one-half months passed by and no hearing and no arbitration being available, plaintiff filed an unfair labor complaint with the N.L.R.B. As a result, within about two weeks he was put back on the Group 1 list.

Shortly thereafter, the N.L.R.B. sent plaintiff a letter asking him to either come to the office and be interviewed about the complaint, or withdraw the complaint, and if he did neither, the N.L.R.B. would dismiss the complaint. Plaintiff withdrew the complaint in August, 1969, as he wanted to get a ship and work again after being unemployed about three months while endeavoring to settle this dispute.

Plaintiff filed an unfair labor complaint against the union on December 17, 1969, because the union still

refused to reinstate him as a member, even though over a year had passed and plaintiff told Mr. Smith that hundreds of seamen had been reinstated to their unions and jobs under the PARKER v. LESTER decision, 227 F.2d 708 (1955), without paying any fees except in some cases a small fee to keep their pension credits up to date.

Plaintiff received a permanent assignment to the S/S Green Ridge and sailed on defendant's vessel for nine months when he requested a trip off for a vacation as per union regulations. On arrival in Bayonne, New Jersey, May 28, 1971, a union official, Mr. Valles, handed plaintiff a letter (A 102) dated January 13, 1971 demanding an initiation fee of $2,000.00 and threatening him with dismissal from his job if he did not pay. That same day, the Captain of the S/S Green Ridge handed petitioner a letter (A 105) dated May 28, 1971, informing him that he would not be rehired without a "clearance" assignment from the union.

Plaintiff refused to pay and complained to the N.L.R.B. and called Mr. Benson on the phone to ask for help. Mr. Benson was unable to help and the N.L.R.B. refused to issue a complaint.

Plaintiff appealed the previous N.L.R.B. unfair complaint decision to the Second Circuit Court of Appeals, Docket No. 72-1091, PELTZMAN v. N.L.R.B. This Court dismissed plaintiff's appeal and refused plaintiff's motion to produce the record for review. PELTZMAN v. N.L.R.B., Docket No. 72-1091, and did not file an opinion. Plaintiff appealed to the U. S. Supreme Court, Docket No. 71-1573. They refused certiorari.

Plaintiff sued the union in Supreme Court, Special Term, sometime in July, 1971 (PELTZMAN v. AMERICAN RADIO ASSOCIATION, ET AL., supra), seeking reinstatement into the union, reinstatement to his permanent job aboard the S/S green Ridge, and damages for wrongful discharge from his employment. The suit was dismissed for lack of jurisdiction. The Appellate Division, First Department affirmed unanimously, and refused to grant permission to appeal to the Court of Appeals. No opinion was filed and plaintiff filed an appeal to the New York State Court of Appeals and that was denied on January 3, 1973. No opinion was filed.

Plaintiff applied for certiorari to the U.S.

Supreme Court and that was denied. (PELTZMAN v. A.R.A., U.S. Supreme Court 72-1080) and plaintiff filed a petition for rehearing which also was denied.

Plaintiff filed suit against defendant in Federal Circuit Court on July 12, 1973. (PELTZMAN v. CENTRAL GULF STEAMSHIP CO., 73 Civ. 2911).

SUMMARY OF ARGUMENT

1. The judgment should be reversed because the opinion of Judge Knapp clearly shows by its own words that there are material facts in dispute in para. (5). And in para (3), Judge Knapp has some doubts as to the N.L.R.B. decision not to issue a complaint being a final decision on the merits because of Prof. Davis' treatise on Administrative Law, Sec. 18.06.

2. Plaintiff argues that the Court below erred in not allowing plaintiff opportunity to procure documents necessary to prove his case. Court erred in not ruling on motions of plaintiff that would substantially prove the allegations in his complaint. Court erred in not granting plaintiff

partial summary judgment on the discharge issue, since defendant admitted plaintiff was not rehired and offered no proof that plaintiff did not have statutory and contract rights to return to the ship after a vacation, and defendant offered no proof that there was persistent and incorrigible disobedience on the part of plaintiff, the only reason under the Maritime Law for discharge of a seaman.

3. Plaintiff will show in his arguments that he does have tenure and statutory rights and contract rights to his job based on the practice and custom of the maritime industry of reshipping seamen if their services are satisfactory and that the union contract gave him permanent status and tenure on the ship (see permanent assignment slip (A40) and Captain's endorsement of very good on his license (A38). Also see Statutes Involved relevant to this matter, and that as a matter of law, plaintiff is entitled to partial summary judgment on his complaint of wrongful discharge since it is clear what the truth is and no general issue on this matter remains for trial.

4. The other matters of damages, closed shop,

can be litigated, but the wrongful discharge has not been refuted by defendant. The only evidence submitted by defendant in rebuttal is a hearsay affidavit of counsel and an exhibit of the National Agreement between union and company which has the relevant pages pertaining to vacation and arbitration procedures (pp. 38-65) omitted from that exhibit. Also p. 66 has a typewritten (f) paragraph added which was not in the contract. Plaintiff's pleading in opposition to motion for summary judgment shows the actual paragraph eliminated and it is incorporated here p. 66, ensuing vacation benefits.

> "(d) Radio Officers and Radio Electronic Officers on passenger ships shall have the right after six months of continuous employment to have a special leave of absence granted of one trip off with no pay. Such special leave shall not be considered as a break in service for any purpose." (Emphasis added) (A 94)

5. Plaintiff argues that the omission of the relevant pages and the added paragraph instead of the actual one is a fraud on the Court in an effort to hamper and obstruct the Court in its efforts to arrive at the truth in this litigation.

6. The plaintiff asks that judicial notice be taken of its Court records and has incorporated in his exhibits certified copies of Decree No. 24737, and with a partial stipulation therein, plus certified copy of Docket No. 21791 with index of brief therein of National Labor Relations Board v. American Radio Association. Both cases show the illegal closed shop and hiring hall practices condemned there and still continuing. The Court below in its opinion disregarded this certified evidence and thereby committed error, since it relied only on the conclusion that the N.L.R.B. had made an investigation into plaintiff's complaint, but the Court's records will show the actual practices of the union and the company which mandated the decree that issued in the two previous cases. Also, the plaintiff's pleadings show four more cases of discrimination against the American Radio Association union members that were condemned by different Courts, and these cases also were disregarded by the lower Court in his summary opinion. (A113-118)

7. The Court below in its opinion discussed the Edwards case, but disregarded the fact that in England, the

closed shop is permitted, but Taft-Hartley forbids the closed shop in the United States in interstate commerce, and if that had been the case in Edwards, punitive damages would have been awarded instead of nominal damages. (A 83-84)

8. The Court below in its opinion discussed 46 U.S.C. Sec. 594, but did not discuss Title 46, Sec. 599a mentioned in the Memorandum of Law in plaintiff's motion to strike, cited by Justice Brandeis in ADAMS v. TANNER, 344 U.S. 616, as a precedent for the protection of the applicant for a job, the Act of Congress, December 21, 1898, 30 Stat. 755, 763, which provides among other things:

> "If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as a seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be liable to a penalty of not more than a hundred dollars."

POINT I

THE LOWER COURT ERRED IN HOLDING THAT JURISDICTION WAS PRE-EMPTED BY THE NATIONAL LABOR RELATIONS BOARD.

The cases cited in the motion to strike and

summary judgment pleadings show the Court's error.

1. RUZICKA v. GENERAL MOTORS CORPORATION, 336 F. Supp. 824 (1972) - It was held that refusal of regional director of the National Labor Relations Board to issue a complaint against union on basis of charges brought by union member, which refusal was affirmed by the general counsel of the N.I.R.B. did not constitute res judicata and did not collaterally estop union member from proceeding in court on theory of breach of union's duty of fair representation.

(a) Plaintiff argues that the Maritime Law gives him even more protection than his union's contract against arbitrary dismissal without written charges and a hearing, since only dereliction of duty to the ship and proof of persistent and incorrigible disobedience on the part of a seaman in relation to his ship and Captain's orders is grounds for dismissal.

2. LOCAL UNION NO. 59 OF THE SHEET METAL WORKERS INTERNATIONAL ASSOCIATION v. J. E. WORKMAN, 343 F. Supp. 480 (1972) - It was held although union failed to appeal to the General Counsel of the N.L.R.B. from adverse decision of

regional director who refused to issue a complaint, union's action against employers for violation of labor contract would not be dismissed under pre-emption doctrine on ground that union had failed to exhaust administrative remedy.

(a) Plaintiff argues that he appealed N.L.R.B. prior decision not to issue a complaint to Court of Appeals and then to U. S. Supreme Court and the fact of certiorari being denied did not go to the merits since only the conclusion of the N.L.R.B. was in the record and of course, plaintiff argued that the union officials lied about date when he was expelled and also that the contract was invalid because of closed shop and the fact that no notice of expulsion was given to plaintiff. In this connection, plaintiff points out that the N.L.R.B. attorneys when questioned about the case against the A.R.A. in this Court, Docket No. 24737 in 1971, disclaimed any knowledge of such action and it was not until about four months ago in November, 1973, that plaintiff got the records and learned that the complainant against the A.R.A. was the Radio Officers union, the competing union in the marine industry who themselves had been adjudged guilty of violating members' rights in the

R.O.U. case (347 U.S. 17), three years earlier, decided in this very same Court.

3. In pleadings opposing motion for summary judgment, plaintiff cites nine cases to effect that N.L.R.B. is not the sole arbiter of unfair complaints. THOMAS McCOY, ET AL. v. CONSOLIDATION COAL CO. & UNITED MINE WORKERS, ET AL., 380 F. 269 cert. den. 389 U.S. 1059 - Refusal of Board to issue unfair labor practice complaint did not constitute adjudication for purposes of applying doctrine of res judicata in subsequent Court action under this section governing suits by and against labor organizations.

4. TODD SHIPYARDS v. INDUSTRIAL UNION OF MARINE SHIPBUILDING WORKERS, 344 F.2d 107, concurrent jurisdiction N.L.R.B.

5. POWERS V. TROY MILLS (1969) 303 F. Supp. 1377, concurrent jurisdiction. N.L.R.B. unfair complaint and violation of collective bargaining contract.

6. CHASIS v. PROGRESS MANUFACTURING CO., 382 F.2d 773. N.L.R.B. not pre-empting rights of employee.

7. POWERS v. TROY MILLS, 303 F. Supp. 1377. Four cases that hold N.L.R.B. decision not res judicata - Local Union No. 59 of Sheet Metal Workers v. J. E. Workman Inc., 343 F. Supp. 480; Local Union No. 4 Int. B. of E.W. v. Radio-Thirteen-Eighty Inc., 334 F. Supp. 242; United Rubber, Cork. etc. Workers v. Lee National Corp., 323 F. Supp. 1181, cert. den. 395 U.S. 904; International Workers of E.R. & M. Workers v. General Electric Co., 407 F.2d 253.

8. In JOHNSON v. GRAND RAPIDS BLDG. TRADES COUNCIL, 33 C.C.H. Lab. Cas. nr. 70, 996, Mich. Cir. Ct. 1957, revsd. 357 Mich 1, 97 N.W. 63, 1959 (Federal pre-emption) - The plaintiff sought relief in State Court after N.L.R.B. had refused to entertain charges. Granting the relief sought, Smith, J. said: "If the Courts are without jurisdiction here these parties are without legal process of any kind. . .". Such a situation should be abhorred in a constitutional atmosphere guaranteeing due process, equal protection justice for all. . . It seems clear that Congress has no power to deny due process or any process in exercising its power in commerce.

(a) A devestating criticism of N.L.R.B. rulings is in the Wayne Law Rev., Vol. 14, 1126 (1968) by Sylvester Petro, titled Expertise, the N.L.R.B. the Constitution, things abused and things forgotten.

POINT II

COURT WILL ACT TO CORRECT ABUSES WHEN CONTRACT BETWEEN UNION AND SHIPPING COMPANY IS INVALID AND WHEN MEMBERS ARE TREATED DISCRIMINATORILY IN VIOLATION OF MARITIME LAW.

1. The Court is asked to take judicial notice of its records in regard specifically to the union that plaintiff belongs and which the N.L.R.B. on two separate certified occasions ruled and this Court held that they had violated members' rights and had signed an illegal contract even while the N.L.R.B. hearings were being held.

(a) Plaintiff's argument that the maritime industry is a closed shop industry is verified with the decrees in this Court mentioned in Point I, Docket No. 24737 and Docket No. 21791 (A64-82). Portions of these decrees and pages will be inserted into Appendix. The R.O.U. case, supra, is also relevent here, and in the Circuit Court, the Berman case against N.M.U. and various shipping companies

is relevant (166 F. Supp. 327). Also the N.L.R.B. v. N.M.U. case, 175 F.2d 686, cert. den. 338 U.S. 954, is also relevant.

(b) In RADIO OFFICERS UNION v. NATIONAL LABOR RELATIONS BOARD, (supra), the provisions of the National Labor Relations Act by which it is an unfair practice for an employer to discriminate against employees to encourage or discourage membership in any labor organization, 29 U.S.C. Sec. 158(b) (2) and 29 U.S.C. Sec. 158(a) (3), or for a union to cause an employer to practice such discrimination, were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members or abstain from joining any union without imperiling their livelihood. (Emphasis added).

(c) In the Berman case (supra), the Court decided it had jurisdiction on complaint of seamen who said they were being discriminated by union and shipping companies. Judge Bicks made a settlement and plaintiffs were restored to union and counsel's fees of petitioners. $10,000.00 was paid by union and shipping companies. Action arose under Labor Management Relations Act, 29 U.S.C. 141 et seq. The Court had jurisdiction by virtue of 28 U.S.C. 1337.

Steamship companies claimed N.L.R.B. had jurisdiction but Judge Bicks said the Court had jurisdiction.

2. In plaintiff's motion to strike his memorandum of law includes nine cases relevant here and show the relation of the seaman towards his ship under the contracts between the shipping companies and the union and in relation to Maritime Law. (A12-16)

3. MAHONEY v. SAILORS UNION OF PACIFIC, 275 P.2d 440 - Reinstatement ordered because of denial of property rights of union member without due process of law. Also held that N.L.R.B. did not have exclusive jurisdiction of case and State Court had power to reinstate Mahoney.

4. In NATIONAL LABOR RELATIONS BOARD v. WATERMAN S.S. CO., 309 U.S. 206, 218, and SOUTH ATLANTIC S.S.CO. v. NATIONAL S.S. CO. NATIONAL LABOR RELATIONS BOARD, 116 F.2d 480, cert. den. 313 U.S. 582, it was held,

> "Seaman's tenure and relationship to his ship and employer are not terminated by the mere expiration of the articles."

5. SOUTHERN S.S.CO. v. N.L.R.B., 316 U.S. 31, 62 -

Formal signing off shipping articles on termination of voyage was not conclusive on question whether seamen had been discharged on the ship's return to home port, but tenure of their employment was required to be determined in the light of all the evidence concerning the employer's employment customs and practices.

6. In VITCO v. JONICH, 130 F. Supp. 945, affmd. 234 F.2d 161 - "Period of employment" historically meant to the end of voyage, but now includes full wages throughout the period of employment, whether employment is for a voyage or for a definite time.

7. In BROWN v. NATIONAL UNION OF MARINE COOKS & STEWARDS, reported in Court decisions - N.L.R.B. Vol. VIII, p. 1070, 104 F. Supp. 685 -

The N.L.R.B. regional director instituted an action for injunctive relief under Sec. 10(j) of the Labor Management Relations Act 1947. As a result, men who were screened off by the Coast Guard and other seamen who had had optioned to join a rival union were reinstated to their jobs, notwithstanding the union's refusal to give these men

assignments to these jobs. Answering the defense of the employer that the contract provision obligated them to accept only men assigned to them by the union, Judge Lemmon decided that the employer may not take shelter under the contract if there be a showing of unfair practice, since it is the statute and not the contract which is the measure of duty and the liability.

(a) Plaintiff argues that the Brown case is in point exactly to his own but in plaintiff's case, he had a permanent assignment to the ship and left for one trip off for a vacation and the Maritime statutes protected him from wrongful discharge.

8. In PENINSULAR & O. SS CO. v. NATIONAL LABOR RELATIONS BOARD, 98 F.2d 411, and in TEXAS CO. v. N.L.R.B., 120 F.2d 186,

It was held the Maritime Law when in conflict with the National Labor Relations Act, is supreme.

(a) Plaintiff argues that defendant's reliance on MOTOR COACH EMPLOYEES v. LOCKRIDGE, 403 U.S. 274 (1971) as authority for their contention that the N.L.R.B. pre-empted

plaintiff's cause of action, falls flat on its face in the light of these seamen's cases based on the N.L.R.A. Taft-Hartley and also on statutes in the Maritime Law and the L.M.R.D.A. Bill of Rights, plus U.S. Constitutional Rights.

(b) Plaintiff will incorporate in the Appendix (A113-126 parts of memorandum of law and miscellaneous authorities not mentioned in his Points, and asks that the Court also take judicial notice of the cases included in those authorities.

Plaintiff wishes to cite four cases relating to closed shop agreements, preferential hiring, permit card system of hiring, and one case of monoply anti-trust agreement in the maritime field.

(a) ANDERSON v. SHIPOWNERS ASSOCIATION OF THE PACIFIC COAST, ET AL., 272 U.S. 351 (1926) - (a) A combination whereby the owners and operators of ships engaged in interstate and foreign commerce surrender completely their freedom of action in respect of the employment of seamen to associations formed to regulate and control the subject, violates the Anti-Trust Act (p. 362) (A106) (See last

paragraph of Port Captain's letter relating to contract); (b) Ships and those who operate them are instrumentalities of commerce and within the Commerce Clause, no less than cargoes (p. 363).

Plaintiff argues that this combination which the U. S. Supreme Court ruled violated the Anti-Trust Act is exactly the case in point here, the difference being that where in 1926 the shipowners forced the seamen to carry a certificate from the association and a card is issued to the ship stating "he must not be employed on your ship in any capacity unless he presents an assignment card, grey in color, issued by us and addressed to your vessel designating the position to which we have assigned him." (P. 362). Now in 1971 the union registers the seamen, and issues the card and no seaman can work unless he applies to a maritime union and gets a "clearance". The only exceptions are a few oil companies who operate their own ships and the United States Government through the Military Sea Transportation Service which carries only Government cargoes and does not require union membership for any of its jobs aboard ship.

2. WALSCHE, ET AL. v. SHERLOCK, ET AL., 159 A. 661 (1932) New Jersey, Syllabus 13 - Contract between members of trade union and union providing for installation and compliance with "permit" and "card index system" for obtaining employment, held void as against public policy. (Const. Art. 1, par. 1) ([redacted]).

Syl. 7 - Constitutional rights of laborer to sell labor and of employer to employ cannot be alienated, nor can Legislature nor trade union deprive citizen thereof. (Const. Art. 1, par. 1).

Syl. 8 - Contracts containing oppressive restrictions on unalienable rights and generally to prevent workmen from obtaining employment and from earning livelihood are in restraint of trade, against public policy, and void. (Const. Art. 1, par. 1).

Syl. 6 - Alleged internal remedies available to members of local labor union held, in effect, futile, illusory, and vain, entitling members to appeal to courts without exhausting such remedies.

Plaintiff argues that if the New Jersey Legislature had heeded this decision of Vice Chancellor Berry in

1932, the building trades in New Jersey would not still be a closed shop industry, but because of no specific statutes except the Jersey Constitution, the building industry is still a closed shop industry and only recently has the Federal Government started to open these building trades by suing the unions under the Civil Rights Act.

Plaintiff argues that the seaman is protected by specific statutes, i.e., the Merchant Marine Act of 1920, but because of inability of individual seamen to enforce those statutes in the Courts and the reluctance of the Federal Government and the N.L.R.B. to intervene to protect seamen, the maritime industry is now a closed shop industry and has been at least since 1948. See testimony of Lunquist and a Grace Line Captain in Docket No. 21791 (p 120-122), p 112-113 p 82-83

N.L.R.B. v. A.R.A. It is also a subsidized industry with the U. S. Government paying part of the cost of building new ships and subsidizing part of the wages of seamen.

3. PLUMBERS UNION v. DILLON, CA 9 (1958) 42 L.R.R.M. 2225 - The fact that a contract contains a clause

that violates the Taft Act doesn't mean that the rest of the contract cannot be enforced, a Federal Appeals Court has ruled. Company sued because of failure of union to supply workers. Union claimed contract unenforceable because of closed shop provision, but Court ruled that this did not taint the entire contract with illegality.

Plaintiff argues that the very purpose of a trade union is to protect the rights of each one of its members to earn his living and to take advantage of all that goes with it. It is the very purpose of its being. (Per Lord Dunning's opinion in Edwards case, supra) and plaintiff argues that he had a permanent assignment to the ship and the Maritime Law protects seamen specifically by the signing of the articles on each foreign voyage, and the cases cited by plaintiff as to hire and tenure of seamen show that it is the seamen's contract with the ship that controlseven after he signs off articles (See WATERMAN & SOUTHERN SS CO. and VITCO cases, supra), and OLIVER v. ALEXANDER, 31 U.S. 143, 6 Ret. 143, 8 Led. 349 (1832).

The shipping articles constitute a several contract with each seaman.

4. N.L.R.B. v. PACIFIC MARITIME ASSN, 172 N.L.R.B. No. 234 (1968) 69 L.R.R.M. 1133 -

Preferential hiring - An agreement requiring a company to five preference in hiring to union members is illegal.

In INTERNATIONAL UNION OF OPERATING ENGINEERS v. N.L.R.B., CA 2, 321 F.2d 130 - It was held hiring hall operation under which union members acquired seniority more readily than non-members, and non-members were required to continue permit payments even when not working to retain seniroity was unlawful in operation.

POINT III

The contract relied on by defendant, the Administrative ruling relied on by defendant, the decision in any previous litigation in which the defendant was not a party, the National Labor Relations Act and any other point relied on by the defendant must be construed in its relation to the Maritime Law which controls this case, and any contract which is repugnant to the Constitution or the Maritime Law must be struck down by the Courts.

1. In HARDEN v. GORDON, Fed. Cas. 6047 (C.C. Me.

1823) quoted in the Law of Seamen, p. 534, Sec. 501, it was there held:

> "Every Court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overeached. But Courts of maritime law have been in the constant habit of extending toward them a peculiar protecting favour and guardianship . . . They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. (Emphasis added). If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transactions, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tonto the bargain ought to be set aside as inequitable."

(a) Plaintiff argues it would be redundant and almost impossible to improve on the decision of Justice Story, even though the case was decided in 1823. Plaintiff

would like to update the reasoning and judgments of later Judges and lists the following cases to show that in effect, though seamen are educated now, are capable of entering into contracts, that the crimps and unscrupulous employers of 1832 have been replaced in 1974 by a monopolistic agreement between shipping companies and unions, to the detriment of the seaman who is forced by the closed shop in the maritime industry to join and remain in the union as a condition of employment or else lose his livelihood.

2. In U. S. v. JOINT TRAFFIC ASSN., 171 U.S. 505, it was held that contracts creating monopoliies are unlawful under the Anti-Trust Act.

3. The Anderson case, supra, is also to this point.

4. In PETITION OF OSKAR TIEDMANN & CO., 236 F. Supp. 895 (1964), it was held that maintenance and cure is part of maritime contract irregardless of contract of employer and employee.

(a) Plaintiff argues that the modern equitable holdings in the maritime field as exemplified by the

Waterman, Southern SS & Vitco cases (supra) show the customs of hire and tenure of employment irregardless of contract denigrating the rights of seamen. As was held by Justice Lemmon in the Brown case (supra), it is the statute and not the contract that controls.

(b) In SMELTZER v. ST. LOUIS & S.F.R. CO., 158 Federal Reporter, on p. 657 in a discussion of Liberty of Contract is quoted the rulings in relation to sailors, minors, etc., all to the effect that contracts are to be construed in relation to special circumstances, and they will be struck down of they are in violation of statutes protecting certain ~~occupants and minors~~, occupations and minors.

CONCLUSION

For the foregoing reasons, the Court is urged to reverse the decision of the District Court insofar as that decision constitutes an erroneous interpretation of the pre-emption doctrine of the National Labor Relations Act, Taft-Hartley, and the Landrun Griffin Act. The Court is urged to grant partial summary judgment for the plaintiff on his complaint of wrongful discharge, based on the protection

afforded seamen by statutory and constitutional rights.

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February 28 , 1974.